Supreme Court of the United States

OCTOBER TERM, 1926.

No. 261.

TYSON AND BROTHER-UNITED THEATRE TICKET OFFICES, INC.,

Appellant,

against

JOAB H. BANTON, as District Attorney of the County of New York, State of New York, and VINCENT B. MURPHY, as Comptroller of the State of New York.

APPELLANT'S MEMORANDUM ON JURISDICTION, FILED BY PERMISSION OF THE COURT.

LOUIS MARSHALL,
JAMES MARSHALL,
Appellant's Counsel.

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I.

This case was properly brought in the United States District Court to protect the appellant's property rights against infraction by a statute claimed to be unconstitutional.

The bill of complaint graphically describes the nature of the business conducted by the plaintiff, that of selling tickets of admission to theatres and places of amusement. It indicates the volume of the business transacted, the

manner in which it is conducted, the expenses incurred, the effect of the statute which has been challenged upon the business, the fact that the plaintiff has obtained a license upon the execution of a bond, in the penal sum of $1,000, with sureties, that such bond would be forfeited if the plaintiff sold tickets at a price exceeding fifty cents beyond that printed on the ticket, and that the license would be subject to revocation and the plaintiff would be punishable for a misdemeanor for every violation of the provisions of the statute. For each misdemeanor the plaintiff could be punished by one year's imprisonment or a fine of $250 or both.

This brings the case within a long line of decisions, of which the following is an incomplete list:

Ex parte Young, 209 U. S. 123.
Truax v. *Raich*, 239 U. S. 33.
Adams v. *Tanner*, 244 U. S. 590.
Assaria State Bank v. *Dolley*, 219 U. S. 121.
Engel v. *O'Malley*, 219 U. S. 128.
Lemke v. *Farmers Grain Co.*, 258 U. S. 50, 65.
Terrace v. *Thompson*, 263 U. S. 197.
Porterfield v. *Webb*, 263 U. S. 225.
Webb v. *O'Brien*, 263 U. S. 313.
Frick v. *Webb*, 263 U. S. 326.
Packard v. *Banton*, 264 U. S. 140, 143.
Hygrade Provision Co. v. *Sherman*, 266 U. S. 497.
Schafer v. *Farmers Grain Co.*, 268 U. S. 189.
Pierce v. *Society of Sisters*, 268 U. S. 510.
Weaver v. *Palmer Bros. Co.*, decided March 8, 1926, 46 Supreme Court Rep. 320.

In each of these cases an action was brought in equity in the United States District Court for an injunction restraining public officials from enforcing a penal statute under circumstances similar to those set forth in the bill of complaint in the present case, and the existence of jurisdiction in equity was recognized.

The rule applicable to jurisdiction in equity to relieve against such a state of facts is stated by Mr. Justice Sutherland in *Packard* v. *Banton, supra,* as follows:

> "But it is settled that 'a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property.' *Truax* v. *Raich,* 239 U. S. 33, 37-38. The question has so recently been considered that we need do no more than cite *Terrace* v. *Thompson,* 263 U. S. 197, where the cases are collected; and state our conclusion that the present suit falls within the exception and not the general rule."

In *Pierce* v. *Society of Sisters, supra,* Mr. Justice McReynolds said, referring to the complainants:

> "But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss sustained by such action."

The fact that such jurisdiction exists is necessarily implied by the enactment of Section 266 of the Judicial Code, which lays down the procedure in an action in which an injunction is sought to suspend or restrain the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute upon the ground of its unconstitutionality. The requirements of that Act were strictly complied with in the present case.

Similar procedure was adopted in *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, although that case came here on

error to the Supreme Court of the State of Nebraska and was reversed.

It is also to be noted that the constitutionality of Chapter 590 of the New York Laws of 1922, now under consideration, was sought to be reviewed in this Court in *Weller* v. *New York*, 268 U. S. 319, after a decision by the Appellate Division of the New York Supreme Court (207 App. Div. 337) and by the New York Court of Appeals (237 N. Y. 316). This Court, therefore, has the benefit of the views of those tribunals respecting the constitutionality of this Act. Those opinions are analyzed under Point III of our Brief, at pages 62-80. The *Opinion of the Justices*, 247 Mass. 589, based on the decision of the New York Court of Appeals in *People* v. *Weller*, is also analyzed on pages 36-45 of our Brief. These two opinions present all of the arguments advanced on behalf of the appellees herein.

The procedure adopted in reliance upon the numerous recent precedents of this Court is in the interest of a speedy administration of justice. The sole question to be determined is whether the legislation which has been challenged violates the due process clause of the Constitution.

Respectfully submitted,

LOUIS MARSHALL,
JAMES MARSHALL,
Appellant's Counsel.